

The Honorable Ricardo S. Martinez
Chief United States District Judge

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

CASE NO. 2:17-CV-00218-RSM-JPD

Daniel Ramirez Medina,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; and U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES,

Defendants.

**PLAINTIFF'S SUPPLEMENTAL BRIEF IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION, DKT. 122**

Attorneys for Plaintiff:

PUBLIC COUNSEL

MARK D. ROSENBAUM (CA SBN 59940), *pro hac vice*

mrosenbaum@publiccounsel.org

JUDY LONDON (CA SBN 149431), *pro hac vice*

jlonon@publiccounsel.org

KATHRYN A. EIDMANN (CA SBN 268053), *pro hac vice*

keidmann@publiccounsel.org

ANNE M. HUDSON-PRICE (CA SBN 295930), *pro hac vice*

aprice@publiccounsel.org

ELIZABETH HADAWAY (CA SBN 308800), *pro hac vice*

ehadaway@publiccounsel.org

610 South Ardmore Avenue

Los Angeles, CA 90005

Telephone: (213) 385-2977

Facsimile: (213) 385-9089

GIBSON, DUNN & CRUTCHER LLP

THEODORE J. BOUTROUS, JR. (CA SBN 132099), *pro hac vice*

tboutrous@gibsondunn.com

KATHERINE M. MARQUART (CA SBN 248043), *pro hac vice*

kmarquart@gibsondunn.com

NATHANIEL L. BACH (CA SBN 246518), *pro hac vice*

nbach@gibsondunn.com

JESSE S. GABRIEL (CA SBN 263137), *pro hac vice*

jgabriel@gibsondunn.com

333 South Grand Avenue

Los Angeles, CA 90071-3197

Telephone: (213) 229-7000

Facsimile: (213) 229-7520

ETHAN D. DETTMER (CA SBN 196046), *pro hac vice*

edettmer@gibsondunn.com

555 Mission Street

San Francisco, CA 94105

Telephone: (415) 393-8200

Facsimile: (415) 393-8306

ERWIN CHERMERINSKY (DC SBN 289330; IL SBN 3122596), *pro hac vice*

echemerinsky@law.berkeley.edu

University of California, Berkeley, School of Law

**Affiliation for identification purposes only*

215 Boalt Hall

Berkeley, CA 94720-7200

Telephone: (510) 642-6483

1 LEAH M. LITMAN (DC SBN 1016310), *pro hac vice*
2 llitman@law.uci.edu
3 University of California, Irvine School of Law
4 *Affiliation for identification purposes only
5 401 East Peltason Drive, Educ 1095
6 Irvine, CA 92697
7 Telephone: (949) 824-7722

8 LAURENCE H. TRIBE (MA SBN 126736; CA SBN 039441), *pro hac vice*
9 larry@tribelaw.com
10 Harvard Law School
11 *Affiliation for identification purposes only
12 1575 Massachusetts Avenue
13 Cambridge, MA 02138
14 Telephone: (617) 495-1767

15 ELIZABETH HAWKINS (SBN 43187)
16 ehawkins@hawkinsimmigration.com
17 Hawkins Law Group
18 17544 Midvale Avenue, Suite 301
19 Shoreline, WA 98133
20 Telephone: (206) 728-4220
21 Facsimile: (206) 973-5326

22 LUIS CORTES ROMERO (CA SBN 310852), *pro hac vice*
23 lcortes@ia-lc.com
24 Immigrant Advocacy & Litigation Center, PLLC
25 19309 68th Avenue South, Suite R-102
26 Kent, WA 98032
27 Telephone: (253) 872-4730
28 Facsimile: (253) 237-1591

29 NORTHWEST IMMIGRANT RIGHTS PROJECT
30 MATT ADAMS (SBN 28287)
31 matt@nwirp.org
32 615 Second Ave., Suite 400
33 Seattle, WA 98104
34 Telephone: (206) 957-8611

At the May 1, 2018 hearing, the Court indicated that it was ready to grant Plaintiff's Motion for Preliminary Injunction (Dkt. 122) ("Motion") had Defendants not already reinstated Mr. Ramirez's DACA and work authorization pursuant to the classwide order in *Inland Empire–Immigrant Youth Collective v. Nielsen*.¹ The Court therefore ordered supplemental briefing to (a) confirm that the Court may enjoin Defendants on the current pleading and record in front of it, and (b) provide Defendants an opportunity to respond to Plaintiff's request for relief as reflected in the revised proposed order provided to Defendants and the Court at the May 1 hearing (and filed herewith).

The Court has broad powers to order appropriate injunctive relief now on the operative pleading, to enjoin further action by Defendants based on their false allegations of gang membership given that Defendants have already conceded in an adjudicative proceeding that Mr. Ramirez is not a public safety concern. Such relief is necessary to provide Mr. Ramirez what he has always sought: meaningful restoration of his DACA status and a return to the status quo before Defendants unlawfully arrested him and tarred him with false allegations of gang affiliation. And because time is of the essence and Mr. Ramirez will continue to suffer irreparable harm until an injunction issues, Mr. Ramirez respectfully asks the Court to act swiftly to (1) maintain the status quo (*i.e.*, enjoin Defendants from terminating Plaintiff's DACA status and work authorization) pending adjudication on the merits and (2) enjoin Defendant USCIS from continuing to falsely accuse Plaintiff of being a gang member in any further proceedings.

And the Court need not and should not wait for USCIS to again terminate Mr. Ramirez's DACA before righting the government's wrongful conduct. Indeed, without the relief that Mr. Ramirez seeks, Defendants could repeatedly attempt to strip Mr. Ramirez of his benefits based on these false allegations while claiming each time that the Court must wait to act until Defendants

¹ In other words, the Court would have found that Plaintiff had established his entitlement to preliminary relief either (i) by demonstrating a likelihood of success on the merits, irreparable harm in the absence of preliminary relief, that the balance of equities tips in Plaintiff's favor, and that an injunction is in the public interest; or (ii) by satisfying the Ninth Circuit's sliding scale approach by demonstrating serious questions going to the merits and a balance of hardships that tips sharply toward the plaintiff. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011) (describing standard for preliminary injunction and sliding scale approach). Because the argument and evidence underlying Plaintiff's motion as set forth in his prior briefing provide an ongoing basis for the relief sought, Plaintiff principally addresses herein the procedural questions raised by the Court at the May 1 hearing.

1 inflict the inevitable harm on Mr. Ramirez that comes with terminating his DACA and work
2 authorization. That cannot be the case. As set forth herein, the Court has broad equitable powers to
3 act now to prevent such injustice.

4 **A. Defendants’ Renewed Actions to Harm Mr. Ramirez and In-Court Concessions Confirm**
5 **the Need for Immediate Injunctive Relief.**

6 After Defendants terminated Mr. Ramirez’s DACA status and work authorization in February
7 2017, they were required to reinstate his status pursuant to the February 26, 2018 *Inland Empire*
8 order that certified a class of which Mr. Ramirez is a member. *See* Dkt. 126. However, at the same
9 time that the government reinstated Mr. Ramirez’s benefits, it sought to terminate them again on the
10 same unlawful basis, using a slightly different procedural tool. Defendants issued him a Notice of
11 Intent to Terminate (“NOIT”) based on the same flawed, unsupported, and thoroughly discredited
12 allegations that he is a gang member or gang affiliated. Indeed, counsel for the government conceded
13 at the May 1 hearing that those discredited allegations are the basis for the NOIT:

14 THE COURT: Is the plaintiff correct that by filing the notice to terminate, that you
15 intend to once again rely on the allegations that Mr. Ramirez is a gang member, has
16 associated with gang members, and therefore needs to have that DACA status
17 terminated?

18 MR. ROBINS: Essentially, yes, Your Honor.

19 Declaration of Nathaniel L. Bach in Support of Suppl. Br. (“Bach Decl.”) ¶ 2 (Hrg. Tr. at 20:7–12).

20 The Court then sought to confirm whether the government has “any other evidence to
21 substantiate [its claim] that he’s a gang member or is associated with gang members,” but
22 Defendants’ counsel’s had no real answer. *Id.* (at 20:24–21:7).² The government’s failure to answer
23 this direct question is further proof that it has no evidence to support its claim that Mr. Ramirez has

24 ² The government’s counsel responded to the question by stating that “the government would dispute the court’s
25 characterization and opposing counsel’s characterization that there is some record or administrative record that
26 establishes, one way or the other, with absolute conclusiveness, about Mr. Ramirez’s gang affiliations or the lack
27 thereof.” Bach Decl. ¶ 2 (Hrg. Tr. at 21:1–7). That statement is remarkable for two reasons: *first*, it concedes that the
28 government does not have evidence—despite having over a year to substantiate its allegations and despite its access to
many criminal databases—to prove that Mr. Ramirez is a gang member; and *second*, because the government already
conceded, based on the same record, that it “do[es]n’t believe *from this record* there is enough for us to argue that he’s a
danger to the community,” when the allegation of gang membership was the government’s basis for claiming that Mr.
Ramirez presented a public safety issue. Dkt. 122-1 at 31 (Bond Hrg. Tr. at 26) (emphasis added).

gang affiliations. This latest concession follows Defendants’ repeated failure over the past 15 months to produce any evidence to substantiate their allegations, despite Mr. Ramirez’s counsel’s repeated requests that they do so. *See* Dkt. 122-2 ¶¶ 5–8.

Mr. Ramirez had 33 days to respond to the NOIT, and submitted his response today, May 7. Defendant USCIS may now act at any time to again terminate Mr. Ramirez’s DACA on these false pretenses, thereby violating Mr. Ramirez’s rights under the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment to the United States Constitution. For the reasons set forth in this brief and in Plaintiff’s Motion (Dkt. 122), Reply (Dkt. 124), *Ex Parte* Motion to Expedite (Dkt. 126), and at argument on May 1, 2018, Mr. Ramirez respectfully requests that the Court maintain the status quo pending merits adjudication by enjoining Defendants from terminating his DACA status and work authorization, and from repeating or relying on the baseless allegations of gang affiliation in any further proceedings.

B. The Court Has the Authority to Enjoin Defendants’ Unlawful Behavior on the Operative Pleading and Record Before It.

Defendants object that the relief sought by the Motion—and the different scope of relief necessitated by Defendants’ shifting tactics—was not contemplated by the operative pleading (the Second Amended Complaint (“SAC”)). Dkt. 125 at 2 (citing *inter alia* *Gray v. Sorrels*, No. CV-16-145-RAW-SPS, 2017 WL 167912, at *2 (E.D. Okla. Jan. 17, 2017)). But Defendants’ non-binding authority is irrelevant in light of the numerous binding precedents, as well as the Federal Rule of Civil Procedure, that confirm the Court’s authority to grant necessary relief when circumstances change after the filing of the operative pleading.³

1. Ninth Circuit Authority Confirms this Court’s Ability to Issue the Injunction based on the SAC.

The Court may grant the Motion based on the SAC as filed because “[s]o long as a party is entitled to relief, a trial court must grant such relief despite the absence of a formal demand in the party’s pleadings.” *In re Bennett*, 298 F.3d 1059, 1069 (9th Cir. 2002); *see also* *Z Channel Ltd.*

³ Moreover, *Gray* relied on another case that found a lack of “a relationship between preliminary relief and the claims in [the petitioner’s] habeas petition.” *Gray*, 2017 WL 167912, at *2 (citing *Terry v. Jones*, 2007 WL 962916 (W. D. Okla. Mar. 30, 2007) (emphasis added)). Here, however, the SAC details *repeatedly* how Mr. Ramirez is harmed by being falsely labeled as a gang member. Dkt. 78 ¶¶ 55-59, 63-69, 74-77, 83-84.

1 *P'ship v. Home Box Office, Inc.*, 931 F.2d 1338, 1341 (9th Cir. 1991) (collecting authorities). Thus,
 2 the Court may, on the current pleadings, grant Plaintiff's Motion. *Cf.* F.R.C.P. 54(c) ("Every . . .
 3 final judgment should grant the relief to which each party is entitled, *even if the party has not*
 4 *demand[ed] that relief in its pleadings.*") (emphasis added).⁴ Therefore, Defendants' argument that
 5 Plaintiff's Motion "would not appropriately be before the court without amendment of the complaint"
 6 (Bach Decl. ¶ 2 (Hrg. Tr. 25:5–6)) is contradicted by Circuit law and the Federal Rules.⁵

7 This principle dovetails with the Court's "broad powers and wide discretion to frame the
 8 scope of appropriate equitable relief" when issuing a preliminary injunction. *SEC v. United Fin.*
 9 *Grp., Inc.*, 474 F.2d 354, 358–59 (9th Cir. 1973) (upholding issuance of preliminary injunction); *see*
 10 *also United States v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 228 (9th Cir. 1978) ("The equity
 11 jurisdiction of the federal courts traditionally has permitted the fashioning of broad and flexible
 12 decrees molded to the necessities of the individual case."). Moreover, "the court may go beyond the
 13 matters immediately underlying its equitable jurisdiction and decide whatever other issues and give
 14 whatever other relief may be necessary under the circumstances. Only in that way can equity do
 15 complete rather than truncated justice." *Coca-Cola Bottling*, 575 F.2d at 228–29 (quoting *Porter v.*
 16 *Warner Holding Co.*, 328 U.S. 395, 398 (1946)).

17 And the Supreme Court has made clear that the federal courts may "'adjust their remedies so
 18 as to grant the necessary relief' where federally secured rights are invaded." *J. I. Case Co. v. Borak*,
 19 377 U.S. 426, 433 (1964) (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)); *see also Kay v. City of*
 20 *Rancho Palos Verdes*, 504 F.3d 803, 813 (9th Cir. 2007) (quoting *Bell*, 327 U.S. at 684) (confirming
 21 it is "'well settled that where legal rights have been invaded, and a federal statute provides for a
 22 general right to sue for such invasion, federal courts may use any available remedy to make good the
 23 wrong done'"). Were it otherwise, a defendant could always seek to do what these Defendants did:

24 _____
 25 ⁴ Although Rule 54(c) speaks to "final judgments," it would make no sense to impose a higher procedural burden on
 preliminary relief, particularly where Defendants have altered their behavior since the filing of the operative complaint.

26 ⁵ While Ninth Circuit precedent, Rule 54(c), and the mootness doctrine confirm that the Court can grant relief on the
 27 current pleadings, should the Court feel that it needs a more specific amended pleading, Plaintiff will immediately file a
 28 third amended complaint. Should the Court require an amended pleading, it would not then need to wait to grant
 Plaintiff's Motion and issue injunctive relief while Defendants' response to the new pleading is pending. *See NORML v.*
Mullen, 608 F. Supp. 945, 950 n.5 (N.D. Cal. 1985) ("Owing to the peculiar function of the preliminary injunction, it is
 not necessary that the pleadings be perfected, or even that a complaint be filed, before the order issues.").

game the judicial system by changing the landscape during the course of litigation to frustrate a court's ability to enjoin shifting wrongful conduct.

2. The Mootness Doctrine Further Confirms that the Court May Act in the Face of Shifting Circumstances.

The mootness doctrine further reinforces the fact that the Court retains its ability to fashion appropriate relief where a defendant alters its conduct during the course of litigation. *See Inland Empire–Immigrant Youth Collective v. Nielsen*, Case No. EDCV-17-2048-PSG, Slip Op. at 15 (C.D. Cal. Apr. 19, 2018) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000)) (noting that the standard for “determining whether a case has been mooted by the defendant’s voluntary conduct is stringent: A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur”). In rejecting the government’s contention that named plaintiffs’ claims had been rendered moot by the government’s compliance with the *Inland Empire* court’s class certification and preliminary injunction order, the court found that the plaintiffs continued to maintain standing and that their claims were not mooted by the government’s conduct. *Inland Empire*, Slip Op. at 15 (C.D. Cal. Apr. 19, 2018) (noting that reinstatement of plaintiffs’ DACA and issuance of a NOIT do not render claims moot); *Rosemere Neighborhood Ass’n v. EPA*, 581 F.3d 1169, 1173 (9th Cir. 2009) (“the mere cessation of illegal activity in response to pending litigation does not moot a case”).

Here, Defendants have not ceased their unlawful activity—they continue to rely on the false claim that Mr. Ramirez is gang affiliated in seeking to terminate his DACA anew—further confirming that preliminary relief remains warranted. *See Johansen v. San Diego Cty. Dist. Council*, 745 F.2d 1289 (9th Cir. 1984) (quoting *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)) (“An action is not moot if it is ‘capable of repetition, yet evading review.’”). Indeed, even had USCIS not delivered the April 3, 2018 NOIT to Mr. Ramirez, the Court would retain the ability to enjoin Defendants from relying on the gang allegations that they have already conceded are not supported by sufficient evidence where they are capable of repeating their use of those allegations to cause Mr. Ramirez harm. *Id.*; *see also Vegas Diamond Props., LLC v. FDIC*, 669 F.3d 933, 936–37 (9th Cir. 2012) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983)) (case is not moot when “named

plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality”).

3. The Court Need Not Wait to Enjoin Defendants’ Reliance on Discredited Accusations of Gang Membership.

Defendants’ argument at the May 1 hearing that USCIS’s action is not yet final and the Court therefore lacks the ability to review the issuance of the NOIT mischaracterizes the relief Plaintiff seeks, as an initial matter, and is wrong in any event, for multiple reasons.

First, Mr. Ramirez seeks to enjoin Defendants’ use of the false allegation that he is a gang member, or is gang affiliated, in any proceedings. Notably, Plaintiff does not seek early review of agency action, which might then implicate issues of finality. And the relief he seeks is not limited to the NOIT issued against him and the agency’s further action on that NOIT. These distinctions are important.⁶ The Court need not wait for USCIS to do what counsel for Defendants acknowledged will occur—*i.e.*, the termination of Mr. Ramirez’s DACA based on the false claim of gang affiliation (*see* Bach Decl. ¶ 2 (Hrg. Tr. at 20:7–15))—before it can act to enjoin the use of admittedly unsupported allegations. To hold otherwise would mean that an agency could always act in bad faith to restart or begin new proceedings using the same discredited allegations and thereby inflict ongoing harm on an individual such as Mr. Ramirez.

Accepting Defendants’ erroneous contention that the Court cannot act would mean that Mr. Ramirez could be stuck in an endless loop of bad-faith government action: each time the Court restored his DACA, the government could issue a new NOIT on the same false basis and the Court would be powerless to intervene. Such a result would be unjust, and counter to the rules and law governing agency action. *See, e.g., Judulang v. Holder*, 565 U.S. 42, 53, 55 (2011) (APA requires government to “exercise its discretion in a reasoned manner” and make discretionary decisions “based on non-arbitrary ‘relevant factors’”) (citation omitted); *Ranchers Cattlemen Action Legal*

⁶ Of course, once USCIS acts on the NOIT and issues its termination notice, Mr. Ramirez’s DACA status and employment authorization will have again been terminated, at which point any possible doubt about the Court’s authority to act will have been eliminated. The recent order in *Gonzalez-Torres v. U.S. Dep’t of Homeland Sec.*, 2018 WL 1757668 (S.D. Cal. Apr. 12, 2018) that the government cited at the May 1 hearing simply confirms that this Court has jurisdiction to examine and rule on USCIS’s termination of DACA status following issuance of a NOIT. Should the Court feel that it cannot act to enjoin the government until termination occurs, the Court could either wait to issue its order, or stay its order enjoining Defendants from terminating Mr. Ramirez’s DACA and work authorization pending such later action. Should the Court require, Plaintiff would be willing to bring such later action immediately to the Court’s attention for emergency *ex parte* relief. But forcing Mr. Ramirez to again suffer this imminent harm based solely on Defendants’ false claims would be the height of injustice and exactly the sort of wrong that equitable power is meant to foreclose.

Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 499 F.3d 1108, 1115 (9th Cir. 2007) (agency action is “arbitrary and capricious” where agency “offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different in view or the product of agency expertise”) (quotation marks and citation omitted); *see generally* Dkt. 122 (Mot. 9–10). Therefore, it is the *use* of those false and unsupported allegations that this Court can and should enjoin.

Second, even if the determination to persist in using these discredited allegations implicated the final agency action rule⁷—which it does not for the reasons discussed above—there is an explicit exception to the final agency action rule where court relief is needed to protect the individual targeted by the agency from suffering irreparable harm. *See Anderson v. Babbitt*, 230 F.3d 1158 (9th Cir. 2000) (discussing irreparable harm and harm to due process rights as factors that may be “sufficient to abrogate the statutory requirement of finality”) (citing *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976)); *Fort Sumter Tours, Inc. v. Andrus*, 440 F.Supp. 914, 919–20 (D.S.C.), *aff'd* 564 F.2d 1119 (4th Cir. 1977) (court issued preliminary injunction on APA claim finding that “factor militating against further agency action is the irreparable injury likely to be suffered by the Plaintiff”).⁸ Separately, the Court could issue an order delaying USCIS’s imminent termination of Mr. Ramirez’s DACA status from ever going into effect and causing him irreparable harm. *See* 5 U.S.C. § 705 (APA provides that “to the extent necessary to prevent irreparable injury, the reviewing court . . . may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.”).

Here, the very act of again relying on the falsehood that Mr. Ramirez is a gang member or gang affiliated, in the face of concessions and findings to the contrary, causes him irreparable harm in

⁷ In any event, in the NOIT itself, USCIS has made the following *determinations*, which could be considered final in and of themselves: USCIS has “determined that exercising prosecutorial discretion to defer removal action in your case is not consistent with DHS’s enforcement priorities”; and “USCIS has determined, in its unreviewable discretion, that [Mr. Ramirez] do[es] not warrant a favorable exercise of prosecutorial discretion.” Dkt. 126-1 (Ex. C).

⁸ Moreover, judicial intervention may be justified before final action “where, as here, there is a substantial showing that an agency has exceeded the authority granted it by Congress, or that it is acting unconstitutionally.” *Mount Sinai Hosp. of Greater Miami, Inc. v. Weinberger*, 376 F. Supp. 1099, 1120 (S.D. Fla. 1974), *reversed on other grounds* 517 F.2d 329 (5th Cir. 1975); *see also Gellis v. Casey*, 338 F. Supp. 651, 652–53 (S.D.N.Y. 1972) (a “district court may correct a preliminary agency decision when the agency has plainly exceeded its statutory authority or threatens irreparable injury in clear violation of an individual’s rights”) (citation omitted).

the form of deprivation of his constitutional rights (*see Hernandez v. Sessions*, 872 F.3d 976, 994–95 (9th Cir. 2017)), emotional harm and stress inflicted by the continuing insistence of gang membership (*see Chalk v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 840 F.2d 701, 710 (9th Cir. 1988)), and harm to Mr. Ramirez’s reputation (*see Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1324 n.5 (9th Cir. 1994)). Under Defendants’ theory, an agency could maliciously defame an individual and trample his constitutional rights, and there would be no recourse until agency action were complete. Such a result is not supported or contemplated by the final action doctrine. The Court has the power to preserve the status quo pending a final decision on the merits, and should do so here. *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988).

Third, even if this Court had to wait for USCIS to take additional action before it could enjoin Defendants’ behavior on the basis of Mr. Ramirez’s APA claims, Mr. Ramirez is separately entitled to the order he seeks on the basis of his claim that Defendants violated his due process rights. Indeed, courts can act to enjoin constitutional violations even where agency action is not otherwise reviewable. *See Hata v. United States*, 23 F.3d 230, 233 (9th Cir. 1994) (quoting *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 791 (1985)) (“We recognize . . . that review of constitutional claims may still be available upon a sufficiently pleaded allegation of a serious constitutional violation ‘going to the heart of the administrative determination.’”). Here, Defendants have violated Mr. Ramirez’s due process rights because their actions are fundamentally unfair, *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 850 (1998), “shock the conscience,” and “offend the community’s sense of fair play and decency.” *Marsh v. Cty. of San Diego*, 680 F.3d 1148, 1155 (9th Cir. 2012). In other words, any argument that the Court must wait for USCIS to act to again terminate Mr. Ramirez’s DACA and work authorization is immaterial because Defendants’ due process violations provide a separate and continuing basis on which to issue the necessary relief. *See Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975) (“[A] fair trial in a fair tribunal is a basic requirement of due process. This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but our system of law has always endeavored to prevent even the probability of unfairness.”) (internal citations and quotation marks omitted).

And this Court has already found that Mr. Ramirez has stated a claim for violation of his due

process rights. Dkt. 116, at 18 (denying Defendants’ motion to dismiss and noting it “cannot” be that “no process is due” to DACA recipients, “particularly . . . where benefits have already been conferred”). This use of unsupported allegations that are unsupported by the evidence available to the agency, particularly in the face of on-the-record concessions that the government does not have evidence to support a finding that Mr. Ramirez is a public safety risk, is the type of contradictory conduct that is fundamentally unfair under the Due Process Clause, which forbids such actions. *See Raley v. Ohio*, 360 U.S. 423, 437–39 (1959) (prosecuting someone for conduct that state officials advised was legal violated due process); *Cox v. Louisiana*, 379 U.S. 559, 568–71 (1965) (“convicting a citizen for exercising a privilege which the State had clearly told him was available to him” violates due process).

* * *

For the reasons set forth above and in the briefs and argument supporting his Motion for Preliminary Injunction, Mr. Ramirez respectfully requests that the Court (1) maintain the status quo by enjoining Defendants from terminating Plaintiff’s DACA status and work authorization pending adjudication on the merits and (2) enjoin Defendant USCIS from continuing to falsely accuse Plaintiff of being a gang member in any further proceedings.

DATED: May 7, 2018
Seattle, Washington

Respectfully submitted,

/s/ Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

THEODORE J. BOUTROUS, JR. (CA SBN 132099), *pro hac vice*

ETHAN D. DETTMER (CA SBN 196046), *pro hac vice*

KATHERINE M. MARQUART (CA SBN 248043), *pro hac vice*

NATHANIEL L. BACH (CA SBN 246518), *pro hac vice*

JESSE S. GABRIEL (CA SBN 263137), *pro hac vice*

/s/ Mark D. Rosenbaum

PUBLIC COUNSEL

MARK D. ROSENBAUM (CA SBN 59940), *pro hac vice*

JUDY LONDON (CA SBN 149431), *pro hac vice*

KATHRYN A. EIDMANN (CA SBN 268053), *pro hac vice*

ANNE M. HUDSON-PRICE (CA SBN 295930), *pro hac vice*

ELIZABETH HADAWAY (CA SBN 308800), *pro hac vice*

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document should automatically be served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Theodore J. Boutrous, Jr.

The Honorable Ricardo S. Martinez
Chief United States District Judge

**UNITED STATES DISTRICT COURT
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Defendants.

**DECLARATION OF NATHANIEL L. BACH
IN SUPPORT OF PLAINTIFF'S
SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR PRELIMINARY
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Attorneys for Plaintiff:

PUBLIC COUNSEL

MARK D. ROSENBAUM (CA SBN 59940), *pro hac vice*

mrosenbaum@publiccounsel.org

JUDY LONDON (CA SBN 149431), *pro hac vice*

jlonon@publiccounsel.org

KATHRYN A. EIDMANN (CA SBN 268053), *pro hac vice*

keidmann@publiccounsel.org

ANNE M. HUDSON-PRICE (CA SBN 295930), *pro hac vice*

aprice@publiccounsel.org

ELIZABETH HADAWAY (CA SBN 308800), *pro hac vice*

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610 South Ardmore Avenue

Los Angeles, CA 90005

Telephone: (213) 385-2977

Facsimile: (213) 385-9089

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JESSE S. GABRIEL (CA SBN 263137), *pro hac vice*

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333 South Grand Avenue

Los Angeles, CA 90071-3197

Telephone: (213) 229-7000

Facsimile: (213) 229-7520

ETHAN D. DETTMER (CA SBN 196046), *pro hac vice*

edettmer@gibsondunn.com

555 Mission Street

San Francisco, CA 94105

Telephone: (415) 393-8200

Facsimile: (415) 393-8306

ERWIN CHERMERINSKY (DC SBN 289330; IL SBN 3122596), *pro hac vice*

echemerinsky@law.berkeley.edu

University of California, Berkeley, School of Law

*Affiliation for identification purposes only

215 Boalt Hall

Berkeley, CA 94720-7200

Telephone: (510) 642-6483

DECLARATION OF N. BACH

Case No. 2:17-cv-00218-RSM-JPD

Counsel Listed on Pages I–II

1 LEAH M. LITMAN (DC SBN 1016310), *pro hac vice*
2 llitman@law.uci.edu
3 University of California, Irvine School of Law
4 *Affiliation for identification purposes only
5 401 East Peltason Drive, Educ 1095
6 Irvine, CA 92697
7 Telephone: (949) 824-7722

8 LAURENCE H. TRIBE (MA SBN 126736; CA SBN 039441), *pro hac vice*
9 larry@tribelaw.com
10 Harvard Law School
11 *Affiliation for identification purposes only
12 1575 Massachusetts Avenue
13 Cambridge, MA 02138
14 Telephone: (617) 495-1767

15 ELIZABETH HAWKINS (SBN 43187)
16 ehawkins@hawkinsimmigration.com
17 Hawkins Law Group
18 17544 Midvale Avenue, Suite 301
19 Shoreline, WA 98133
20 Telephone: (206) 728-4220
21 Facsimile: (206) 973-5326

22 LUIS CORTES ROMERO (CA SBN 310852), *pro hac vice*
23 lcortes@ia-lc.com
24 Immigrant Advocacy & Litigation Center, PLLC
25 19309 68th Avenue South, Suite R-102
26 Kent, WA 98032
27 Telephone: (253) 872-4730
28 Facsimile: (253) 237-1591

NORTHWEST IMMIGRANT RIGHTS PROJECT
MATT ADAMS (SBN 28287)
matt@nwirp.org
615 Second Ave., Suite 400
Seattle, WA 98104
Telephone: (206) 957-8611

1 I, Nathaniel L. Bach, declare as follows:

- 2 1. I am an attorney admitted to practice law *pro hac vice* before this Court. I am an associate at
3 the law firm of Gibson, Dunn & Crutcher LLP, and I am one of the attorneys responsible for
4 the representation of Daniel Ramirez Medina (“Mr. Ramirez”) in the above-captioned action.
5 I submit this declaration in support of Plaintiff’s Supplemental Brief in Support of Motion for
6 Preliminary Injunction (Dkt. 122). The following facts are within my personal knowledge
7 and, if called and sworn as a witness, I would testify competently to these facts.
8 2. Attached hereto as Exhibit A is a true and correct copy the court reporter’s certified transcript
9 of the May 1, 2018 hearing on Plaintiff’s Motion for Preliminary Injunction.

10 I declare under penalty of perjury under the laws of the United States and the State of Washington
11 that the foregoing is true and correct, and that I executed this Declaration on May 7, 2018, in Los
12 Angeles, California.

13 /s/ Nathaniel L. Bach

14 Nathaniel L. Bach
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EXHIBIT A

1 UNITED STATES DISTRICT COURT.
2 WESTERN DISTRICT OF WASHINGTON AT SEATTLE
3

4 DANIEL RAMIREZ MEDINA,)
5) C17-00218-RSM
6 Plaintiff,) SEATTLE, WASHINGTON
7)
8 v.) May 1, 2018
9)
10 U.S. DEPARTMENT OF HOMELAND) Motion Hearing
11 SECURITY; JOHN KELLY,)
12 Secretary of Homeland)
13 Security; NATHALIE ASHER,)
14 Director of the Seattle)
15 Field Office of U.S.)
16 Immigration and Customs)
17 Enforcement,)
18)
19 Defendants.)

14 VERBATIM REPORT OF PROCEEDINGS
15 BEFORE THE HONORABLE RICARDO S. MARTINEZ
16 UNITED STATES DISTRICT JUDGE
17

17 APPEARANCES:

18 For the Plaintiff: Ethan D. Dettmer
19 Gibson, Dunn & Crutcher
20 555 Mission Street
Suite 3000
San Francisco, CA 94105

21 Nathaniel L. Bach
22 Gibson, Dunn & Crutcher
23 333 South Grand Avenue
Los Angeles, CA 90071

24 Mark D. Rosenbaum
25 Public Counsel
610 S. Ardmore Avenue
Los Angeles, CA 90005

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Luis Cortes Romero
Immigrant Advocacy & Litigation
Center
19309 68th Avenue South
Suite R102
Kent, WA 98032

Matt Adams
Northwest Immigrant Rights
Project
615 Second Avenue
Suite 400
Seattle, WA 98104

For the Defendant:

Jeffrey S. Robins
James Walker
U.S. Department of Justice
Civil Division
Office of Immigration Litigation
PO Box 868, Ben Franklin Station
Washington, D.C. 20044

1 THE CLERK: This is the matter of Daniel Ramirez
2 Medina versus United States Department of Homeland Security,
3 United States Immigration and Customs Enforcement, and United
4 States Citizenship And Immigration Services, Case No. C17-218
5 assigned to this court. Will counsel please rise and make
6 your appearances for the record.

7 MR. DETTMER: Good morning, Your Honor, Ethan Dettmer
8 from Gibson Dunn on behalf of Mr. Ramirez.

9 MR. BACH: Good morning, Your Honor, Nathaniel Bach,
10 also from Gibson Dunn on behalf of Mr. Ramirez.

11 MR. ROMERO: Good morning, Your Honor, Luis Cortes
12 Romero on behalf of Mr. Ramirez.

13 MR. ROSENBAUM: Good morning, Your Honor, Mark
14 Rosenbaum from Public Counsel on behalf of plaintiff.

15 MR. ADAMS: Good morning, Matt Adams, Northwest
16 Immigrant Rights Project, on behalf of plaintiff.

17 THE COURT: Counsel, thank you.

18 MR. ROBINS: Good morning, Your Honor, Jeffrey Robins
19 from Department of Justice Office of Immigration Litigation,
20 for defendants.

21 MR. WALKER: Good morning. James Walker from the
22 Department of Justice for the defendants.

23 THE COURT: Counsel, thank you as well.

24 Gentlemen, the court has reviewed all of the material that
25 was submitted on this matter for today's hearing. And we've

1 set today's hearing basically for plaintiff to be able to
2 make their argument, for the court to hear the defense
3 response to the request for a preliminary injunction in this
4 particular case.

5 My understanding is that Mr. Dettmer, Mr. Bach, both of
6 you will be arguing on behalf of the plaintiff?

7 MR. DETTMER: Yes, Your Honor.

8 THE COURT: Who's going first?

9 MR. DETTMER: If I may, Your Honor.

10 Thank you, Your Honor, Ethan Dettmer on behalf of
11 Mr. Ramirez. If I may, Mr. Ramirez is here in court today
12 and I'd like to introduce him to Your Honor.

13 THE COURT: Please.

14 MR. DETTMER: Along with his brother Tony, are here
15 to hear the proceedings.

16 THE COURT: Good morning.

17 MR. DETTMER: Thank you, Your Honor. With Your
18 Honor's indulgence, what I'd like to do is just briefly lay
19 out how we got here today and what today is about. And then
20 I'd like to turn it over to my colleague to argue the merits
21 of the PI motion.

22 THE COURT: All right.

23 MR. DETTMER: So, Your Honor, why we're here is
24 because over a year ago, the government broke its promise
25 that it made to Mr. Ramirez in the DACA program. And it

1 broke that promise on the basis of a falsehood. And that
2 falsehood was that Mr. Ramirez was part of a gang, or was
3 affiliated with a gang. And that was not true on
4 February 10th when it first was raised. And that has only
5 become a more stark and a more vicious lie as the time has
6 gone on. And that lie is why we're here today. And I'm just
7 going to recount, briefly, the history of how that falsehood
8 has gotten so egregious to lead us here today.

9 THE COURT: Mr. Dettmer, let me interrupt you.
10 There's been a lot of -- there have been a lot of other
11 courts that have heard similar cases like this regarding
12 DACA, correct?

13 MR. DETTMER: That's right, Your Honor.

14 THE COURT: We've had the benefit of some of those
15 rulings. Just recently, in fact, since the material was
16 submitted -- I think your reply brief came in, just as one
17 court in California ruled as well.

18 MR. DETTMER: Yes, Your Honor.

19 THE COURT: Let me ask you this: Do you believe that
20 your client is a member of the class in *Inland Empire*?

21 MR. DETTMER: Yes, Your Honor.

22 THE COURT: Do you believe he's a member of the class
23 in *Regents*?

24 MR. DETTMER: There isn't a class in that case, Your
25 Honor.

1 THE COURT: I thought that was also a class action
2 case.

3 MR. DETTMER: No, Your Honor, it's not.

4 THE COURT: All right. Does he benefit as a member
5 of the class, from *Inland Empire*?

6 MR. DETTMER: Well, Your Honor, the government has
7 expressly returned his DACA to him, as a result of that
8 ruling. But if I may give a little bit of additional
9 information, which is why we're here. At the same time that
10 the government gave him back his DACA status as a result of
11 the *Inland Empire* decision, it also issued him a notice of
12 intent to terminate his DACA status, based on that falsehood
13 that I had mentioned earlier.

14 And the reason why we're coming to Your Honor for this is
15 because when the government gave him, with one hand, the DACA
16 status that it was required to give him under *Inland Empire*,
17 it took it away from him, based on this statement that he's a
18 gang member, which the government itself has affirmatively
19 disavowed in immigration court and an immigration judge has
20 expressly found is not true. And yet they're still saying
21 the same thing, in an effort to take it away.

22 And so because of that falsehood, that lack of evidence,
23 that fact that its notice of intent to terminate is based on
24 an assertion that has no support in the record, and, in fact,
25 is affirmatively refuted by the record, that decision to try

1 to terminate the DACA status that they were forced to return
2 to him, is a violation of the APA.

3 And Your Honor I think has the ability, and I would submit
4 should, say that the government can't do that. It cannot
5 continue relying on this lie that it has affirmatively
6 disavowed, and other courts have found are not true. And
7 that is, that this young man is a gang member, which just is
8 not so.

9 If I've answered Your Honor's question, I'd like to step
10 back and give you a little bit of a flavor of why I say that
11 this is such an egregious lie that has been doing so much
12 harm to my client. And that is -- I'll just walk through the
13 steps of how the government knows that this young man is not
14 a gang member.

15 Briefly, in 2013 when he first applied for DACA status,
16 they did a background check on him and found no gang
17 affiliation, which is part of getting DACA status. In 2015,
18 all DACA holders were searched for -- there was a background
19 check done for gang affiliation and he maintained his DACA
20 status. In 2016, there was another background check and
21 criminal check, when he renewed his DACA status.

22 As Your Honor knows, on February 10th of last year when he
23 was detained, he was questioned at great length. And the
24 government asserted that he was a gang member. And
25 Mr. Ramirez denied it over and over again.

1 We have submitted, as Your Honor knows, to the court, a
2 series of declarations from experts in gang issues. And they
3 have said that the indicia that the government rely on have
4 no bearing on Mr. Ramirez being a gang member. The tattoo
5 that he has, has no connection to being a gang member.

6 We've also submitted declarations to the court from family
7 members and acquaintances of Mr. Ramirez who testified to him
8 being a peaceful, kind and gentle person, who they've never
9 known to have any affiliation with a gang.

10 And more immediately, in March, when Your Honor ordered a
11 bond hearing, at that hearing the government's lawyer said,
12 "I don't believe, from this record, there is enough for us to
13 argue that he" -- Mr. Ramirez -- "is a danger to the
14 community." That's in the Bach declaration, Exhibit A. It's
15 Docket 122-1 at page 32.

16 THE COURT: So let me ask you this, Mr. Dettmer.
17 This is a bit frustrating for me, because all of the briefing
18 basically focused on the return of his DACA status. And now
19 you've switched that around and actually in your reply to the
20 government's objections, and you've kind of morphed into a
21 completely different area asking the court for different
22 relief. Am I correct?

23 MR. DETTMER: Well, Your Honor, mostly correct.
24 Although, we weren't the ones who did it, Your Honor. It was
25 the government who changed the circumstances by issuing this

1 notice of intent to terminate, after the briefing was
2 completed and in response to the *Inland Empire* case. And by
3 doing it based on, again, this falsehood.

4 So the situation has changed dramatically since the
5 briefing was completed. The government has given with one
6 hand and is trying to take away with the other. But by
7 trying to take away with the other, it's doing it based on
8 something that has no support in the record whatsoever.

9 THE COURT: Well, I understand that they filed --
10 they returned his DACA status. So that part of it, that
11 narrows the issues before this court, right?

12 MR. DETTMER: That's true, Your Honor. I think we
13 have a simple issue.

14 THE COURT: All right. Issuing a notice to
15 terminate, does your client then have the ability to contest
16 that?

17 MR. DETTMER: My client has the ability to submit a
18 writing to the government saying that, again, this isn't
19 true, that he's not a gang member. But because the
20 government has repeatedly said these things and because it
21 has made a decision, its intent to terminate his DACA status,
22 based on an assertion that is affirmatively countered by the
23 record, that is itself a violation of the Administrative
24 Procedure Act.

25 THE COURT: Who gets to make the determination as to

1 whether or not the government is successful in attempting to
2 terminate?

3 MR. DETTMER: The government itself makes that
4 determination. I believe USCIS does it.

5 THE COURT: Without the ability to have that reviewed
6 by anyone else?

7 MR. DETTMER: Yes. So the reason why we're here is
8 because the government continues to make this assertion that
9 it, itself, has disavowed. And it's contrary to what an
10 immigration judge has said. Which, by the way, the court --
11 the government did not appeal. And that's in January of this
12 year the immigration judge said, "The court finds that the
13 respondent was not in a gang, nor associated with one." And
14 that's in the supplemental Bach declaration. It's Docket
15 124-1 at page 14.

16 So, despite all of this -- and I will add to that --
17 Mr. Rosenbaum and I from the beginning of this case have
18 asked the government's counsel to give us anything they have
19 that supports their claim that Mr. Ramirez is in a gang. And
20 nothing has been forthcoming. So what we have here -- and I
21 hear what Your Honor is saying about the procedural
22 situation. It is a very strange procedural situation. But I
23 would submit to Your Honor that in the light of this
24 remarkable series of events with a government agency saying
25 over and over again, something that is demonstrably untrue,

1 and they themselves have admitted they have no evidence of,
2 they should not be able to break this promise and continue to
3 cause this terrible harm to this young man, based on
4 something that they themselves say they have no evidence of.

5 So that's my framing. And I hope I've answered some of
6 Your Honor's questions. I'd like to turn it over to my
7 colleague to argue the law on this, unless Your Honor has
8 other questions from me.

9 THE COURT: No, that's fine. Let's hear from
10 Mr. Bach.

11 MR. DETTMER: Thank you very much, Your Honor.

12 THE COURT: I do have a question for you, Mr. Bach.
13 Good morning.

14 So, he is a member of the class in *Inland Empire*. He does
15 also benefit from the decision in *Regents* as well, right?

16 MR. BACH: Well, that's one of the questions. And
17 part of what is so difficult here is that right now, at the
18 moment, Mr. Ramirez does have his DACA status, because it was
19 returned to him in compliance with the *Inland Empire* order.
20 So, under the *Regents* order, and the other similar nationwide
21 injunctions that have issued since, he would have the
22 opportunity to renew his status.

23 But, again, we find ourselves in the same place, just like
24 with the Notice of Intent to Terminate, the NOIT, where the
25 core fundamental fact is that the false allegation of gang

1 affiliation is going to follow Mr. Ramirez, as long as the
2 government can get away with that, and as long as this court
3 does not act to enjoin the government from doing so.

4 So when he would seek to renew, I mean, it's a fait
5 accompli even at this stage, Your Honor, that the government
6 would rely on that same allegation, which would be an
7 arbitrary and capricious reliance, in violation of the APA.

8 And, similarly, in the Notice of Intent to Terminate, the
9 NOIT, reliance on that core factor at the center of the NOIT
10 is, again, in violation of the APA. And those are the types
11 of worsening, improper behaviors that we're here to ask the
12 court to enjoin, Your Honor.

13 THE COURT: And the problem I have, Mr. Bach, is the
14 same frustration I indicated to your co-counsel over there.
15 In this particular case, all of the briefing was really
16 towards a different issue. And now it's all morphed into
17 something different. And I have your second amended
18 complaint, part of your second amended complaint in front of
19 me. And it says, on page 33 -- and this is the operative
20 complaint, correct?

21 MR. BACH: Yes, that's right, Your Honor.

22 THE COURT: It says: Prayer for relief. Award
23 damages, according to proof. Issue a declaratory judgment
24 that Mr. Ramirez has constitutionally protected interests in
25 his DACA status and benefits incurred thereunder. And order

1 defendants to reinstate his DACA status and work
2 authorization. That's all it says.

3 MR. BACH: Well, in fact, it says something else,
4 Your Honor. It says, at the bottom of that page, if I
5 recall, and other relief that this court would deem fit and
6 proper. Because throughout the course of any litigation, and
7 certainly here, one party, here the defendant, the
8 government, can take actions to alter the landscape. They
9 cannot do so to prejudice the plaintiff in ways that would be
10 a sort of "gotcha" action, to cut the legs out from under the
11 relief that Mr. Ramirez needs.

12 And they certainly cannot divest the court of the ability
13 to make that ruling with the court's broad powers to fashion
14 necessary relief. The court has that power. The court had
15 it when the second amended complaint was filed. The court
16 had that power when the underlying briefing was written and
17 submitted. And it has it now, after issuance of the NOIT.

18 And with respect to your point, Your Honor, which is a
19 good one, and I understand the frustrations about the
20 shifting landscape here, because it's a source of frustration
21 to us as well, but the fundamental fact is that the framework
22 law that applies, the APA violation, the arbitrary and
23 capricious actions that the government has taken, apply with
24 equal force to where we currently stand, as we stood when the
25 briefing was first submitted.

1 When the briefing was filed, the issuance of an NTA and
2 termination of Mr. Ramirez's DACA, based on the issuance of
3 NTA, was arbitrary and capricious, for a number of reasons.
4 And all the courts to consider that issue, Your Honor, are in
5 agreement. *Inland Empire* was in agreement. The *Coyotl* case
6 was in agreement. And the *Gonzales Torres* case was in
7 agreement. And since then, since fixing -- since being
8 forced to change their behavior by virtue of the *Inland*
9 *Empire* order and the issuance of the NOIT, it still contains
10 that core fundamental flaw of the gang affiliation, which
11 remains an arbitrary and capricious violation of the APA, in
12 violation of Mr. Ramirez's due process rights.

13 And, therefore, the briefing and the law that is set forth
14 in the briefing is very on point, Your Honor. It provides
15 the same framework that this court needs, and all the court
16 needs to rule for Mr. Ramirez and to issue the relief that
17 we're seeking here today.

18 THE COURT: I guess, Mr. Bach, I don't necessarily
19 have an argument against that, except for procedurally where
20 we find ourselves today is very, very awkward. And I guess
21 here's the concern: I have defendant's notice and surreply
22 here.

23 And they point out that the court should strike all this
24 because the additional relief sought is problematic for two
25 reasons: "The relief and accompanied argument is introduced

1 for the first time in the reply" -- which is correct -- "and
2 not in the motion for preliminary injunction. And the relief
3 is additional to what was requested in the complaint." Which
4 is also correct, procedurally.

5 So, given that -- and I understand Mr. Robins has been
6 busy with many of these cases in other courts, and stuff, I
7 understand that all of you understand the law in this
8 particular area. But has the government really had the
9 opportunity then to respond to any argument that's being made
10 now?

11 MR. BACH: Well, these are good questions, Your
12 Honor. And the surreply that you cite to and the cases --
13 first of all, one of the cases cited was an Oklahoma case,
14 which is certainly not binding, it's out of the circuit. But
15 for the two core reasons I referenced earlier, the second
16 amended complaint contains that all-important placeholder,
17 that say "for appropriate relief as deemed necessary."
18 Because fundamentally, it's unfair and inequitable for a
19 defendant and for the government to alter the rules of the
20 game as we go along, and then to be able to point back to the
21 pleading that was filed months ago, based on recent actions
22 that the government has taken of its own accord.

23 And there is a litany, a long line of cases in the
24 mootness area, Your Honor, establishing why cases are not
25 rendered moot, or not -- or courts are otherwise not

1 prevented from issuing appropriate relief, where defendants
2 altered their behavior during the course of proceedings.
3 Because to do so would always give the defendants an
4 opportunity to simply change the bad thing, or one of the bad
5 things that the plaintiff has complained about, and therefore
6 attempt to argue that the court no longer has the authority
7 to rule. And that's simply not true.

8 THE COURT: Well, let me ask you this, though. And,
9 again, I don't have any argument against your position. My
10 concern is that maybe this entire hearing is a little too
11 preliminary, that now given the fact that your client has
12 received his DACA status once again, the benefit of the
13 rulings of the other courts that have taken place, should the
14 appropriate thing for the court to do, legally and
15 procedurally, is to allow the government to respond to your
16 very specific argument, that now you're asking, instead of
17 the catchall, "Grant any other and further relief that the
18 court may deem fit and proper," now you've got the specific
19 argument that says: By the way, government, you're not
20 allowed to make any assertion, at whatever level, that
21 Mr. Ramirez has been, is, a gang member, or been associated
22 with gang members, because that's been proven to be wrong.
23 Then let them respond to that argument.

24 MR. BACH: I have a few responses to that, Your
25 Honor. First of all, we would not have an objection to the

1 court requesting additional briefing on that issue, if the
2 government were to agree to withdraw and hold off on the
3 Notice of Intent to Terminate. Because the clock is ticking
4 on that notice that Mr. Ramirez has to respond to. And it
5 contains this same core flaw.

6 The emergency here is of the government's making, Your
7 Honor. And meaningful restoration, the relief that
8 Mr. Ramirez sought in his second amended complaint, and when
9 we filed the preliminary injunction motion, meaningful relief
10 means the restoration of Mr. Ramirez's DACA pending final
11 decision on the merits. But the government has shown itself
12 willing to take steps to try to provide empty relief, empty
13 compliance with the *Inland Empire* order, and to try to give,
14 and as Mr. Dettmer said, take away with the other hand, on an
15 improper basis.

16 And so we would not have an objection to additional
17 briefing. But on the record as it stands -- and the
18 government has had over a year, Your Honor, to provide any
19 other corroborating evidence to support this core flaw -- but
20 fundamentally, that's where we are. That record is set.
21 That record is not augmented by any further evidence that
22 would tend to support that allegation. And it would be odd,
23 procedurally odd that they could find something new to say on
24 that score, in any additional briefing. That would be the
25 kind of procedural delay that we think is unnecessary and not

1 required at this stage. Mr. Ramirez has a clock ticking
2 against him, and should have relief from this court as soon
3 as possible. And we believe on this record. And that's
4 sufficient.

5 THE COURT: Let me ask you this: My clerk indicates
6 that Notice of Intent to Terminate was issued on April 3rd,
7 right?

8 MR. BACH: I believe that's right.

9 THE COURT: So his DACA status and employment
10 authorization were extended to what date?

11 MR. BACH: To May 15th, Your Honor.

12 THE COURT: So the timeframe this court has to decide
13 would be...

14 MR. BACH: Mr. Ramirez's response to the Notice of
15 Intent to Terminate is due May 7th. I understand that the
16 government can act swiftly following the submission of that
17 response. I don't know that there's any proscribed
18 timeframe. Certainly filing the response and then giving the
19 discretion over to the government to act, based on the
20 record, and given that it knows it's now being watched, we
21 wouldn't have any comfort that a long period of time after
22 that date would be -- Mr. Ramirez's status would be safe.

23 But until May 15th is the date on which his DACA and his
24 work authorization are currently extended to under the *Inland*
25 *Empire* order.

1 THE COURT: All right. Counsel, maybe I should hear
2 from Mr. Robins, and then come back to you.

3 MR. BACH: Certainly. I'll just say one final thing,
4 because the relief that we've been talking about and the
5 shifting landscape have required some additional constraints
6 on the government, as you see, based on our amended proposed
7 order that we submitted, along with our reply brief.

8 We, in fact, have, based on the Notice of Intent to
9 Terminate now, we have a slightly revised proposed order that
10 we would submit, which is substantially similar. It contains
11 some language just to make clear and to prevent the
12 government from continuing to rely on this fundamentally
13 false core accusation, which is proven by its actions in the
14 Notice of Intent to Terminate, that it will not do. And I
15 provided a copy of that proposed order to counsel for the
16 government before this hearing, Your Honor. I have a copy
17 here as well for the court's consideration, if I could
18 approach and leave it with the clerk.

19 THE COURT: Please. You may.

20 MR. BACH: If the court has no other questions from
21 me right now, I'm happy to respond to the government after.

22 THE COURT: Thank you very much, Mr. Bach.

23 MR. BACH: Thank you.

24 THE COURT: Mr. Robins.

25 MR. ROBINS: Yes, Your Honor.

1 THE COURT: What is the government doing here,
2 Mr. Robins?

3 MR. ROBINS: Your Honor, the government is here today
4 to explain to the court why it shouldn't grant the new
5 injunctive relief that plaintiff seeks, for the first time,
6 in their reply.

7 THE COURT: Let me ask you this: Is the plaintiff
8 correct that by filing the notice to terminate, that you
9 intend to once again rely on the allegations that Mr. Ramirez
10 is a gang member, has associated with gang members, and
11 therefore needs to have that DACA status terminated?

12 MR. ROBINS: Essentially, yes, Your Honor. The
13 language of the Notice of Intent to Terminate states that
14 USCIS intends to terminate Mr. Ramirez's DACA, based on
15 statements that he himself made regarding gang affiliations.
16 And it gives him, as he asked in his second amended
17 complaint, and as the court ordered in the *Inland Empire*
18 injunction, it gives him notice and the opportunity to
19 respond to those allegations.

20 THE COURT: Given the record that we currently have,
21 with the government not being able to substantiate, other
22 than the allegations of the statements made by Mr. Ramirez at
23 the time he was taken into custody, and the hours following
24 that, do you have any other evidence to substantiate the fact
25 that he's a gang member or is associated with gang members?

1 MR. ROBINS: Your Honor, that is why we have this
2 process. And so the government would dispute the court's
3 characterization and opposing counsel's characterization that
4 there is some record or administrative record that
5 establishes, one way or the other, with absolute
6 conclusiveness, about Mr. Ramirez's gang affiliations or the
7 lack thereof.

8 The administrative challenge that is still before the
9 court in plaintiff's second amended complaint, is a challenge
10 to the automatic termination of Mr. Ramirez's DACA, by
11 issuance of a notice to appear in removal proceedings. The
12 government has submitted a record from ICE and a record from
13 USCIS that supports that decision, in our answer.

14 But additional information from what happened in the
15 immigration court, and the government does dispute
16 plaintiff's characterization of statements made there, there
17 should be a rule of completeness applied to the full
18 immigration judge's ruling there. And there are numerous
19 series of questions as to what preclusive effect any factual
20 finding in that proceeding would have on a further
21 administrative action by USCIS, or the ability of this court
22 to act.

23 Additionally, the declarations that plaintiff has provided
24 in support of his claims here are not actually in a record,
25 an administrative record, before USCIS. It certainly didn't

1 have those statements when it terminated automatically his
2 DACA, when it issued a notice to appear. He now has the
3 opportunity to present those arguments and those statements.

4 And so, what plaintiffs are asking for here goes against a
5 fundamental tenet of administrative law. And that is that
6 the only actions that are reviewable are final agency
7 actions. And so where the *Inland Empire* injunction has
8 resulted in the reinstatement of Mr. Ramirez's DACA and
9 employment authorization, through May 15th, and there is a
10 Notice of Intent to Terminate that reinstated DACA, that
11 Notice of Intent to Terminate is not a final agency action.
12 And as a matter of law -- and the government would, if the
13 court deems fit, appreciate an opportunity to respond.

14 But there are two points in response to that. First, as a
15 matter of law, there's nothing to support that this court has
16 the ability to enjoin a non-final agency action. And until
17 that is final, there is nothing in that potentially new
18 termination that would be reviewable before this court.

19 THE COURT: Let me see if I understand and am
20 following you. Because of what happened in *Regents* and
21 *Inland Empire*, the government has returned his DACA status to
22 him. He has full DACA status as of right now?

23 MR. ROBINS: Yes.

24 THE COURT: The government has filed a Notice of
25 Intent to Terminate. And you're indicating that as of right

1 now, there is nothing for this particular court to be able to
2 review, because there's no final agency action that has
3 occurred as of yet?

4 MR. ROBINS: That is correct, Your Honor.

5 THE COURT: That he will have the opportunity, when
6 he makes his appearance regarding the notice of intent, to
7 make these very same arguments at that point in time. And
8 then, depending upon what that agency decides, then the court
9 has the ability to review that?

10 MR. ROBINS: The court may have the ability to review
11 it then. We might be in a very similar circumstance to the
12 government's prior arguments in our motion to dismiss in
13 terms of what the court would ultimately have jurisdiction
14 over. But that depends on the final agency decision and how
15 it's formed and what it ultimately says.

16 So, he will have the opportunity to bring that challenge
17 to this court. There may be jurisdictional reasons why, in
18 the agency's exercise of discretion, the court might not
19 ultimately have jurisdiction. But I'll note, Your Honor
20 previously held that what the government argued was a
21 discretionary, non-reviewable action with regard to the
22 automatic termination. The court had jurisdiction over those
23 actions in the termination of Mr. Ramirez's DACA the first
24 time.

25 The second -- if it were to happen a second time, the

1 jurisdictional analysis would be different. Both under the
2 Administrative Procedure Act and under the Constitution. But
3 we're not there yet.

4 THE COURT: Mr. Robins, let me ask this: I get
5 nervous when arguments are morphing in front of me, basically
6 kind of as we speak, from both sides. Because a lot of work
7 goes into the preparation for these particular hearings, in
8 terms of where I think we're going. Then all of a sudden
9 everything kind of shifts. And the whole point about due
10 process is to be able to allow both sides to fully articulate
11 their arguments in the written briefing, so the court has the
12 ability, in advance, to look at the case law, look at the
13 Oklahoma case, look at the 11th Circuit, look at what the
14 rulings have held around the country, rather than kind of
15 fly, you know, by the seat of my pants.

16 So, let me ask you this: Given that this really has
17 morphed into a completely different argument than what all
18 the memos indicate, does it make more sense, perhaps, to
19 allow the parties to brief this particular issue before the
20 court decides?

21 MR. ROBINS: Yes, Your Honor, the government would
22 respect that. But there's some notion that even that
23 practice might not even be necessary where, as the court has
24 noted, the additional relief that plaintiffs are asking for
25 is not in the second amended complaint itself. And so even a

1 supplemental or new motion for preliminary injunction that
2 challenges the Notice of Intent to Terminate, and the
3 intended reasons for the termination, the government would
4 argue and would be happy to argue in papers as well, but
5 would argue today, would not appropriately be before the
6 court without amendment of the complaint.

7 And even then, amending the complaint again to challenge a
8 non-final action is not something the court would have
9 jurisdiction over. Now, that might be ultimately what we
10 brief before the court. But to allow those additional rounds
11 of briefing to get to that result may ultimately be where we
12 wind up.

13 THE COURT: Given what's happening in terms of the
14 timeframes we're looking at, is there a necessity for us to
15 have to act quickly in this?

16 MR. ROBINS: No, Your Honor. And this is why:
17 Plaintiffs have characterized Mr. Ramirez's reinstated DACA
18 as expiring on May 15th. And that is correct. If USCIS
19 receives a response and decides to terminate Mr. Ramirez's
20 DACA, again, and does so before the 15th, then that
21 termination would be effective as of the date it was issued.
22 And that might be subject to an emergency motion in this
23 court.

24 But if USCIS were either not to terminate Mr. Ramirez's
25 DACA, or not to make a decision before May 15th, here's what

1 would happen: Mr. Ramirez's DACA and employment
2 authorization would simply expire. And so in terms of the
3 ultimate relief that plaintiffs asked for and that he
4 specifically asks for in the now amended -- I believe it said
5 this in the supplemental or the amended proposed order that
6 they submitted with their reply, asking that Mr. Ramirez be
7 able to maintain DACA and work authorization until a decision
8 on the merits of his claims; even that ask for relief goes
9 beyond what would be required by any law or practice or
10 policy in that his reinstated DACA, subject to the *Inland*
11 *Empire* injunction, would expire on its own on May 15th.

12 So nothing supports the continuation of DACA and
13 employment authorization, after that date. And so while the
14 government acknowledges that a termination prior to that date
15 does and would take DACA and employment authorization away
16 from Mr. Ramirez, potentially for a number of days, and that
17 he may claim that that causes him some irreparable harm, we
18 would acknowledge that he may have that claim. That
19 nonetheless, the expiration in the natural course of the
20 reinstated DACA on May 15th would cut against any real
21 exigency here. And any claims Mr. Ramirez has with regard to
22 a new final action, if that is termination, could be heard in
23 due course.

24 I would direct the court -- and, again, without the
25 opportunity to brief these issues, the government didn't have

1 the opportunity to bring this case to the court's
2 attention -- but the *Gonzales Torres* matter that opposing
3 counsel cites in the Southern District of California, for
4 similar jurisdictional rulings to Your Honor, and other
5 courts who have heard the matter, and the preliminary
6 injunction that was issued in that case, that was the first
7 iteration of that matter.

8 But after Mr. Gonzales had his DACA reinstated pursuant to
9 a preliminary injunction there, the government pursued a
10 Notice of Intent to Terminate his reinstated DACA. The court
11 there then addressed two things, recently. The court denied
12 a second motion for preliminary injunction that would have
13 allowed him to maintain or to get his DACA back, after it was
14 terminated and while he was litigating the termination; and
15 ultimately dismissed his challenge under the APA and the
16 constitutional claims based on the process that he had
17 received.

18 And so I would direct the court to that case as
19 instructive of the relief that plaintiff is seeking here.

20 THE COURT: Thank you, Mr. Robins.

21 MR. ROBINS: Thank you, Your Honor.

22 MR. BACH: Your Honor, a few points in response to
23 Mr. Robins. First, to begin with, Your Honor made an
24 important due process point in one of your questions to
25 government's counsel, about the shifting arguments that the

1 court has to contend with here. That is really,
2 fundamentally, at the heart of the shifting relief and the
3 need for relief that has morphed over time. Notably, those
4 shifting arguments are emblematic of the type of shifting on
5 all sides' behavior that the government has displayed, with
6 respect to Mr. Ramirez, over the past year.

7 They have, as we've put forth in our papers, Your Honor,
8 there's a number of submissions to both this court and to the
9 immigration court which have argued diametrically opposed
10 things with respect to the gang accusation. For example, on
11 the one hand arguing in the record and on the I-213 form,
12 that Mr. Ramirez's tattoo was a gang tattoo. And then at the
13 January 2018 immigration court hearing, submitting evidence
14 in the form of articles that were pulled off the web that
15 simply state that gangs often discourage their members from
16 getting tattoos, and therefore, one could consider the
17 absence of tattoos to also be indicia of gang membership.

18 That boggles the mind, Your Honor, and is the type of
19 shifting argument, shifting story, that has undergirded the
20 government's behavior, not only in its briefing, but also in
21 the administrative process, and gets to the heart of the
22 arbitrary and capricious conduct.

23 The other points -- you asked, to begin with, you asked
24 Mr. Robins: Is there any evidence to suggest that
25 Mr. Ramirez is a gang member, beyond what is stated in a

1 conclusory fashion in the I-213. And counsel did not answer
2 Your Honor's question, because there simply isn't any other
3 evidence.

4 The procedural arguments that the government is trying to
5 make, really amount to trying to hide and couch the court's
6 determination in a very improperly limited record, would
7 simply ignore an entire body of case law about the APA
8 governing agency conduct on the basis of failure to follow
9 its own policies and procedures, arbitrary and capricious
10 conduct, and abuse of discretion.

11 And it's really instructive to hear those set out in open
12 court. Because every time that the government has been asked
13 in this court and in other courts to come forth with any
14 information on the record, in the record that it has to
15 establish his gang ties, it has been unable to do so.

16 And as Mr. Dettmer said to begin with, the concession made
17 at that March 28, 2017 hearing, it really is crucial, Your
18 Honor, because what the government lawyers said to the
19 immigration judges on this record, "I don't believe we have
20 any basis to argue that he is a public safety concern." On
21 this record.

22 So the government is reviewing its own record, the same
23 record that it had in the I-213, it had it at the time it
24 made that statement. And on the record said it didn't have
25 the ability to make that determination. Nothing has changed

1 since then. There is nothing in the record it can point to.
2 And that is, on the other hand, counterbalanced by the great
3 weight of evidence that Mr. Ramirez has submitted to disprove
4 those allegations.

5 Mr. Robins also mentioned a fundamental tenet of
6 administrative law regarding the finality of agency action.
7 While there are fundamental tenets of administrative law that
8 the government is seeking to prevent this court from
9 considering, and that are the entire governing bodies of law
10 with respect to arbitrariness and capriciousness that
11 underlie the motion, and as I mentioned earlier, Your Honor,
12 despite the shifting landscape, fundamentally the core cases
13 that we have cited, the *Judulang* case is particularly
14 instructive, contains a number of very helpful and guiding
15 principles about what the government can do and how it should
16 act and how courts should review that agency action.

17 And really to hear it from the government, the court has
18 no role here in supervising its conduct or an ability to
19 unwind the harm. But as the *Judulang* case said, for example,
20 the AP requires the government to "Exercise its discretion in
21 a reasoned manner, based on non-arbitrary, relevant factors."
22 It also provides the court with authority to review and
23 determine whether the decision was, "Based on a consideration
24 of the relevant factors and whether there has been a clear
25 error of judgment." That is the body of law that enables

1 this court to act, and to act now on the record in front of
2 it, and to provide the relief that is necessary to right the
3 wrong when those wrongs have been shifting over time.

4 You know, it is remarkable that the government is trying
5 to prevent the court from acting, to rely on this
6 fundamentally inadequate record at any time in the future; it
7 really is a buying-time exercise on its part.

8 And, you know, the government at the end acknowledged the
9 harm that Mr. Ramirez is facing by not being able to -- would
10 face by not being able to work. He is, in fact, working now
11 that his DACA status has been restored and his employment
12 authorization has been restored. He's working to provide for
13 himself and his family.

14 If that were terminated by agency action -- and the
15 government has admitted and all of the courts who have
16 considered that issue have found irreparable harm to DACA
17 recipients when their benefits are taken away. That is not a
18 seriously disputed point.

19 And, finally, I would say that the notion that Mr. Ramirez
20 could renew, based on the record in front of it, and if the
21 government is not enjoined from relying on these false
22 accusations, would be futile. The notion that he should or
23 could submit a renewal before the 15th, again, would fold in
24 with the same type of -- we'd find ourselves facing the same
25 type of argument about his gang affiliation. And he would

1 confront that again, leaving it in the hands of the
2 government decisionmakers at CIS who would rubber-stamp that
3 determination.

4 Finally, as to the *Gonzales Torres* case counsel mentioned
5 at the end of his argument, there are key factual differences
6 with that case. That case stands for the unremarkable
7 position that agencies can act when they follow their rules.
8 There was no similar scenario in that instance where there
9 was a woefully inadequate administrative record. The court
10 there considered an administrative record, which had
11 corroborating witnesses, which had an arrest with a
12 chargeable offense under the SOP and the Kelly memorandum,
13 and found that the government had complied with its
14 procedures.

15 That is simply not the case here. This case has been
16 tainted by the fundamental core allegations of gang
17 affiliation, which have been proved false, time and again.

18 And so unless there's meaningful relief from this court to
19 restore that DACA status, pending a final decision on the
20 merits, we'll find ourselves with a shifting landscape. We
21 need to put in place relief that will preserve the status quo
22 moving forward for Mr. Ramirez and for the parties, pending a
23 final decision on the merits. And we certainly would not
24 object to doing that if the court requires any further
25 argument or briefing on any of these subjects, Your Honor.

1 THE COURT: Mr. Bach, I don't have -- again, how do I
2 put this best? To the non-lawyers that are present in the
3 courtroom listening to this, I'm sure they're lost, simply
4 because on one hand you're arguing fundamental issues of due
5 process, what's right, what's wrong, what's justice. The
6 concern the court finds itself in is this procedural status
7 that we are right now.

8 The arguments that were made and the relief that was
9 requested, other than the catchall phrase in the bottom of
10 your complaint, was for something different. And that
11 something different has already occurred. And he's received
12 his DACA status and his employment authorization.

13 I'll tell you right now, had that not happened with *Inland*
14 *Empire* and *Regents*, this court was actually ready to grant
15 your preliminary injunction at this point in time. But now
16 that argument has shifted. Now you're asking me for
17 different relief. And I think in all fairness to the
18 government, they get an ability to brief that specific issue
19 and submit that briefing to the court.

20 My concern is much more from the procedural aspect of it.
21 Not that I'm so concerned about the Court of Appeal, but I
22 want to do my job the way I believe it should be done,
23 properly, and then let the Court of Appeals deal with
24 whatever issues they believe are appropriate.

25 Let me ask you this: Today is May 1st. How quickly could

1 you have some briefing for the government to be able to
2 respond to?

3 MR. BACH: One moment, Your Honor. Your Honor, I
4 think a week would be sufficient for us to submit what I
5 would imagine would be a supplemental argument supporting the
6 preliminary injunction motion. I would leave it to the
7 government as to how much time they need to respond to that.
8 I wouldn't imagine much more. I think their arguments are
9 similar and you've heard them here today. But fundamentally
10 what's important is that the status quo be maintained,
11 pending a resolution of the decision following that briefing,
12 Your Honor.

13 THE COURT: All right. Assuming that would be the
14 8th, then, at the end of business on next Tuesday.
15 Mr. Robins, how long would you need to respond to that?

16 MR. ROBINS: Your Honor, we would similarly ask for
17 one week.

18 THE COURT: That will put us right on the 15th.

19 MR. ROBINS: It would, Your Honor.

20 THE COURT: Is the government willing to leave the
21 status quo as is, without making any changes, to give the
22 court an opportunity to review the briefing that has been
23 submitted and decide whether or not we even need any
24 additional argument?

25 MR. ROBINS: Your Honor, I'm not authorized to agree

1 to that.

2 THE COURT: All right.

3 MR. ROBINS: If a shorter briefing schedule is
4 necessary, then that's something we would be amenable to.
5 But we would ask for a similar amount of time as plaintiffs
6 have.

7 MR. BACH: I would simply say it is within the
8 court's authority to stay that action.

9 MR. ROBINS: I would respectfully disagree that the
10 court has that authority.

11 THE COURT: All right. Let's do this. Like I said,
12 today is the 1st. Let me have the government's (sic)
13 response due by Monday the 7th. Let me have the government's
14 reply to that be by the 14th.

15 MR. BACH: Just to clarify, plaintiff's supplemental
16 briefing by the 7th?

17 THE COURT: Correct.

18 MR. BACH: And the government's by --

19 THE COURT: By the 14th.

20 MR. BACH: That would be fine with us, Your Honor.
21 To the extent the government raises new issues in its
22 opposition, we would reserve our right to submit a reply
23 brief, which we would intend to do within two business days.

24 THE COURT: Based on that, the court can make a
25 determination either fairly quickly, or decide what else it

1 needs to do, in case it wants to bring counsel back for
2 argument. I understand you're based out of Washington, D.C.

3 MR. ROBINS: Yes, Your Honor.

4 THE COURT: I hate that flight coming back. You know
5 what I mean.

6 MR. BACH: Your Honor, is there a particular ruling
7 on the record or court's minute order with respect to staying
8 the proceedings pending the resolution of that briefing?
9 Again, there's a response that Mr. Ramirez has due to the
10 Notice of Intent to Terminate. And we're right up against
11 the 15th with that schedule.

12 THE COURT: Mr. Robins is telling me I don't have
13 that authority to do that at this point in time.

14 MR. BACH: We obviously disagree.

15 THE COURT: I will make that finding. I will make
16 that ruling that the court orders the government to suspend
17 the proceedings until we can deal with this particular issue.
18 And I understand, Mr. Robins, you object to the court --

19 MR. ROBINS: I do, Your Honor. And I would ask,
20 though, while the court may be making that ruling, wouldn't
21 it make sense to nonetheless require plaintiff to respond to
22 the Notice of Intent to Terminate on the existing schedule?
23 If the court wishes to stay any final action on the Notice of
24 Intent to Terminate -- the government would still disagree
25 the court has the authority to do that -- but for the court

1 to prevent this administrative process from going forward,
2 seems problematic, even more problematic, Your Honor.

3 THE COURT: Well, if for whatever reason the
4 government decided that arguments made by Mr. Ramirez made
5 sense, then you're right, the court might not even need to
6 deal with this in the future.

7 MR. BACH: Your Honor, I'd simply say we don't have
8 an objection to submitting Mr. Ramirez's response to the
9 Notice of Intent to Terminate on the 7th -- by the 7th at the
10 time it's currently due. If there's any further action by
11 CIS or the government --

12 THE COURT: Well, Mr. Bach, I think Mr. Robins may
13 have a point, I'm not sure the court has the authority to
14 suspend that. So let me ask for the briefing to occur as it
15 is, and then the court can make a ruling fairly quickly if
16 need be. All right?

17 MR. BACH: Thank you, Your Honor.

18 THE COURT: Mr. Robins, one final question for you,
19 counsel.

20 MR. ROBINS: Yes, Your Honor.

21 THE COURT: I have your opposition to the motion for
22 preliminary injunction in my hand, page 12. You write in
23 there, "Defendants have strong interests in enforcing U.S.
24 immigration laws effectively." If I left out -- you agree
25 with that, correct?

1 MR. ROBINS: Yes.

2 THE COURT: If I delete one word from that, I'm going
3 to ask if you still agree. "Defendants have strong interests
4 in enforcing U.S. laws effectively." Do you agree?

5 MR. ROBINS: I would, Your Honor.

6 THE COURT: Gentlemen, thank you. We'll be at
7 recess.

8 (Recess.)

9
10 C E R T I F I C A T E

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13 I certify that the foregoing is a correct transcript from
14 the record of proceedings in the above-entitled matter.

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18 /s/ Debbie Zurn

19 DEBBIE ZURN
20 COURT REPORTER

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The Honorable Ricardo S. Martinez
Chief United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. 2:17-CV-00218-RSM-JPD

Daniel Ramirez Medina,
Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY; U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT; and U.S.
CITIZENSHIP AND IMMIGRATION
SERVICES,

Defendants.

**[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

1 This matter comes before the Court on Plaintiff's February 6, 2018 Motion for Preliminary
2 Injunction. Upon consideration of Plaintiff's motion and the record, IT IS ORDERED that:

- 3 1. Plaintiff's motion for preliminary injunction is GRANTED; and
4 2. Defendants are ORDERED to restore Plaintiff Daniel Ramirez Medina to the status quo ante
5 by maintaining his DACA status and work authorization until a decision on the merits of his
6 claims;
7 3. Defendant USCIS is ORDERED to accept and process Mr. Ramirez's future DACA renewals
8 and work authorization applications without requiring any showing above and beyond what
9 would have been required had his DACA status and work authorization not previously been
10 terminated, and without asserting that Mr. Ramirez is a gang member, gang affiliated, or a
11 threat to public safety or national security;
12 4. Defendant USCIS is ENJOINED from asserting, adopting, or relying in any proceedings on
13 any statement or record purporting to allege or establish that Mr. Ramirez is a gang member,
14 gang affiliated, or a threat to public safety.

15
16 Dated this ____ day of _____, 2018.

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18 _____
19 THE HONORABLE RICARDO S. MARTINEZ
20 CHIEF UNITED STATES DISTRICT JUDGE
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PRESENTED BY:

/s/ Theodore J. Boutrous, Jr.

GIBSON, DUNN & CRUTCHER LLP

THEODORE J. BOUTROUS, JR. (CA SBN 132099), *pro hac vice*

ETHAN D. DETTMER (CA SBN 196046), *pro hac vice*

KATHERINE M. MARQUART (CA SBN 248043), *pro hac vice*

NATHANIEL L. BACH (CA SBN 246518), *pro hac vice*

JESSE S. GABRIEL (CA SBN 263137), *pro hac vice*

/s/ Mark D. Rosenbaum

PUBLIC COUNSEL

MARK D. ROSENBAUM (CA SBN 59940), *pro hac vice*

JUDY LONDON (CA SBN 149431), *pro hac vice*

KATHRYN A. EIDMANN (CA SBN 268053), *pro hac vice*

ANNE M. HUDSON-PRICE (CA SBN 295930), *pro hac vice*

ELIZABETH HADAWAY (CA SBN 308800), *pro hac vice*

Attorneys for Plaintiff